No. 84-1360 (15)

IN THE

Supreme Court of the United States

October Term, 1984

THE CITY OF RENTON, et al.,
Appellants,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AND THE FREEDOM TO READ FOUNDATION, AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES

MICHAEL A. BAMBERGER
Attorney for *Amici Curiae*
425 Park Avenue
New York, New York 10022
(212) 371-5900

DAVID C. BURGER
FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG, MANLEY & CASEY
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT

The American Booksellers Association, Inc.; the Association of American Publishers, Inc.; the Council for Periodical Distributors Associations; the International Periodical Distributors Association, Inc.; the National Association of College Stores, Inc.; and The Freedom to Read Foundation (collectively referred to as "*amici*") submit this joint brief *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Appellees. This joint brief is submitted upon the written consent of both Appellants and Appellees[1].

The *Amici*

The *amici*'s members publish, produce, distribute, sell and lend books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book pub-

[1] The original of Appellants' written consent by E. Barrett Prettyman, Jr. and the original of Appellees' written consent by Jack R. Burns are filed herewith.

lishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the rights of libraries to in-

clude in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Interest of the *Amici*

The *amici*, as participants in different aspects of making reading material of all kinds available to the general public, have a continuing interest in the decisions of this Court involving the balancing of First Amendment rights, and restrictions on materials with sexual content. The *amici*'s brief will indicate the impact of the legal principles involved upon those who produce, distribute, sell, exhibit and lend material which is not obscene. The *amici* have learned from experience that, in an eagerness to attack the social harms perceived to stem from the prevalence and accessibility of certain sexually-related materials, state and city legislators and enforcement agencies frequently treat legitimate constitutionally-protected books and periodicals no differently from those materials which are obscene and not protected. Unless the constitutionally mandated distinction is maintained, First Amendment rights will be threatened and curtailed.

While the facts underlying the holding in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) relate only to permissible zoning restrictions on adult theatres, the discussion of location restriction in *American Mini Theatres* is cited most frequently in cases not involving or limited to adult theatres but rather involving other materials and communications protected by the First Amendment. *See, e.g., North Street Book Shoppe, Inc.* v. *Village*

of Endicott, 582 F.Supp. 1428, 1432-35 (N.D.N.Y. 1984) (zoning restrictions on adult entertainment businesses including bookstores).

Although the facts of the case *sub judice* implicate only adult theatres directly, this Court's decision can be expected to have a far-reaching impact on the accessibility of books, periodicals and other First Amendment protected materials. In effect, therefore, this case raises the issue of what time, manner and place restrictions may be imposed upon any First Amendment protected materials.

I.

THE CONTENT-BASED RENTON ORDINANCE UNCONSTITUTIONALLY RESTRICTS PUBLIC ACCESS TO NON-OBSCENE, FIRST AMENDMENT PROTECTED EXPRESSION.

The basic principle at issue in this case is whether non-obscene, First Amendment protected materials may effectively be banned from all normal and customary avenues of distribution to the public. The Renton ordinance is a time, place and manner restriction based on the content of certain non-obscene, First Amendment protected expression and therefore the ordinance runs afoul of this Court's First Amendment teachings. *See infra,* at 6. If such a ban were to be approved as to adult theatres, local officials could use this decision as precedent for similarly banning other First Amendment protected, sexually related materials that are found distasteful by some in the community. The City of Renton attempts to justify its ordinance with *post hoc* findings that even a single adult theatre located in the customary commercial districts of Renton would cause a "blight" upon the city. Generalized, hypothetical arguments regarding neighborhood "blight" are so amorphous that they cannot justify the banning of non-obscene expression from mainstream society. Indeed, *amici*'s experience has proved that there are law enforcement officers who consider the public sale of non-obscene erotic publications to itself constitute a blight on the community.

In their attempt constitutionally to justify the Renton ordinance, Appellants rely on the fact that this Court upheld the Detroit ordinance at issue in *Young* v. *American Mini Theatres,* 427 U.S. 50 (1976). That reliance is misplaced and this Court should take this opportunity to correct that misapprehension. Appellants rely on language found in the minority plurality opinion of four of the nine justices which was rejected by Justice Powell in his concurrence, 427 U.S. at 73 n.1, and by the four dissenters, 427 U.S. at 84. The determining vote was cast by Justice Powell in an opinion which stated that "non-obscene, erotic materials may [not] be treated differently under First Amendment principles from other forms of protected expression". 427 U.S. at 73 n.1. Further, Justice Powell found the appropriate test to be:

> (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? On the record in this case, these inquiries must be answered in the negative. At most the impact of the ordinance on these interests is incidental and minimal.

427 U.S. at 78.

Justice Powell's view of the limited permissibility of such time, place and manner restrictions has been justified by the experience since the decision in 1976. Many jurisdictions, such as the City of Renton, viewed *American Mini Theatres* as authorization to enact zoning ordinances imposing significant obstructions to free access to First Amendment protected materials. As Appellants have conceded, the courts have overwhelmingly rejected such an approach. *See* Jurisdictional Statement, at 11-13.

The subsequent opinions of this Court also have recognized that time, place and manner restrictions are valid only if "they are justified without reference to the content of the regulated speech, . . . they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-violence,* 104 S.Ct. 3065, 3069 (1984). *See also: Heffron* v. *Int'l Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 647-48 (1981); *Consolidated Edison Co.* v. *Public Service Commission,* 447 U.S. 530, 535-36 (1980); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumers Council,* 425 U.S. 748, 771 (1976) (time, place and manner restrictions are permissible only when the restrictions are content-neutral).

The use of *American Mini Theatres* by legislators demonstrates one of the dangers inherent whenever this Court creates a crack, however narrow, in the wall of First Amendment protection. Line-drawing is always hazardous, and legislators and jurisdictions facing political and constituency pressures are not always as sensitive to First Amendment concerns as they should be. Repeatedly, cities

have passed ordinances which have the practical effect of either totally banning the regulated First Amendment protected uses, *e.g., Alexander* v. *City of Minneapolis,* 698 F.2d 936, 939 (8th Cir. 1983); *Keego Harbor Co.* v. *City of Keego Harbor,* 657 F.2d 94, 96 (6th Cir. 1981), or achieving the same goal by relegating such protected uses to limited commercially inferior or unacceptable locations[2], *e.g., Basiardanes* v. *City of Galveston,* 682 F.2d 1203, 1209 (5th Cir. 1982) (limited to "swamps, warehouses and railroad tracks" lacking "access roads and retail establishments").

The Renton ordinance is explicitly content specific. The target of the ordinance is any theatre presenting "any . . . visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as hereafter defined, for observation by patrons therein." *Playtime Theatres, Inc.* v. *City of Renton,* 748 F.2d 527, 529 n.1 (9th Cir. 1984). The speech that would be muted, and in effect likely silenced, by a ruling upholding such content-based regulation is fully protected under the First Amendment. The *amici* publish and distribute non-obscene First Amendment protected materials, including books and periodicals with sexual content that address philosophical, social, artistic and literary matters of public concern. The continued availability of such materials through customary avenues of trade would be critically endangered by any ruling endorsing the City of Renton's sweeping ban on expression. In the booksellers' trade, public accessibility is key.

---

[2] These ordinances are not infrequently passed in haste without adequate findings in order to block a specific planned retail establishment. *E.g., 754 Orange Ave., Inc.* v. *City of West Haven,* 761 F.2d 105, 112 & n.6 (2d Cir. 1985); *Avalon Cinema Corp.* v. *Thompson,* 667 F.2d 659, 661-62 (8th Cir. 1981).

Exposure to materials, especially new works, comes about primarily as a result of the reader viewing and perusing the material prior to purchase; in fact, the vast bulk of all sales can be attributed to impulse buying. The free exercise of precious First Amendment rights cannot be preserved in the absence of full access to communicative materials. A ruling authorizing First Amendment protected materials to be banned from all customary avenues of trade, therefore, would deal nearly as deadly a blow to First Amendment rights as would a direct ban of such materials in their entirety.

Appellants' assumption that, in effect, it makes no difference for First Amendment purposes where in a jurisdiction First Amendment protected material is permitted to be distributed so long as it is available somewhere, totally ignores the practical impact of marketing. The pervasive psychological impact of relegating certain First Amendment protected speech—segregated by content—to a "black market" on the outskirts of town would ensure the atrophy of that expression. As this Court stated in *Schad* v. *Mount Ephraim,* 452 U.S. 61, 76-77 (1981): "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Amici* do not argue that material with sexual content should have a privileged status, but rather, as contemplated by the First Amendment, it have an equal platform in the marketplace of ideas.

Time, place and manner regulations that burden expression "must be evaluated in terms of their general effect." *United States* v. *Albertini,* 53 U.S.L.W. 4844, 4848

(U.S. 1985). The general effect of the Renton ordinance is to run non-obscene First Amendment protected speech out of town.

II.

SET-ASIDE STATUTES EFFECT A FAR MORE SIGNIFICANT FIRST AMENDMENT RESTRICTION THAN DO DISPERSAL STATUTES.

Dispersal statutes[3] and set-aside statutes[4] do not have similar effects on the accessibility of First Amendment protected expression, and therefore such statutes are not interchangeable for the purposes of constitutional analysis. Appellants concede that the Renton ordinance is a set-aside statute restricting the showing of certain non-obscene motion pictures to one part of the city distant from the general commercial district. By effectively banning all normal and customary access to this First Amendment protected expression, the Renton ordinance has a drastically more restrictive effect on public access than would a dispersal statute aimed at preventing the concentration of adult uses. The blunderbuss restrictions on First Amendment protected communication contained in the Renton ordinance do not even attempt narrowly to address the general welfare concerns purportedly constituting the justification for the ordinance. The City of Renton attempts to make the truly

[3] Dispersal, or anti-concentration, statutes—such as the Detroit ordinance reviewed in *American Mini Theatres*—require that adult uses be separated some distance from each other.

[4] Set-aside statutes—such as the Renton ordinance—restrict the sale of First Amendment protected materials from all but a specified portion of a community. No set-aside statute has passed constitutional muster in the federal Courts of Appeals. *See infra,* at 10-11.

extraordinary argument that the presence of a single adult theatre in the central commercial districts of Renton would cause such dire effects that the City is justified in banishing such speech from all normal and customary avenues of trade. By concentrating all adult theatres in a single area, the City of Renton will promote many of the adverse effects that it purportedly is attempting to avoid.

As acknowledged by the Appellants, every federal Court of Appeals to reach the merits of a challenge to a set-aside ordinance has stricken the statute as violative of the First Amendment.[5] For example, in *Basiardanes* v. *City of Galveston,* 682 F.2d 1203 (5th Cir. 1982), the Fifth Circuit held unconstitutional an ordinance that banned adult theatres throughout the city except in "industrial zones at a great distance from other consumer-oriented establishments." 682 F.2d at 1214. As in the case *sub judice,* the Fifth Circuit in *Basiardanes* could find no evidence to support "the City Council's assumption that one adult theater located downtown and urban blight are linked." 682 F.2d at 1215-16. In *Avalon Cinema Corp.* v. *Thompson,* 667 F.2d 659 (8th Cir. 1981), the Eighth Circuit struck down a zoning ordinance that prohibited the exhibition or sale of sexually related films within one hundred yards of residential districts, churches, schools and public parks. 667 F.2d 659 at

[5] *See* Jurisdictional Statement, at 11-13. *Genusa* v. *City of Peoria,* 619 F.2d 1203 (7th Cir. 1980), is cited by Appellants as upholding the validity of a *Young*-style adult theatre ordinance. In fact, the Seventh Circuit dismissed the challenge to the zoning provisions requiring adult businesses be separated from residential districts, schools and places of worship on the ground that the plaintiff bookstore owners lacked standing because of a grandfather clause in the ordinance, and only upheld that portion of the ordinance relating to the separation of adult businesses from each other. 619 F.2d at 1210-12.

660 n.3. The Eighth Circuit held the ordinance to be an impermissible time, place and manner restriction since the ordinance "is clearly a content-based regulation of protected speech." 667 F.2d at 663.

The Appellants conceded that the First, Fifth, Sixth, Eighth and Ninth Circuits have stricken regulations of non-obscene First Amendment protected materials like the Renton ordinance. These holdings comport with the rulings of this Court that time, place and manner restrictions may not be content-based. The Renton ordinance similarly must be stricken as violative of the First Amendment.

In evaluating time, place and manner restrictions on First Amendement protected expression, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Schad* v. *Mount Ephraim,* 452 U.S. 61, 75 (1981), quoting *Grayned* v. *City of Rockford,* 408 U.S. 104, 116-17 (1972). *American Mini Theatres* acknowledges that it is within the proper zoning authority of a municipality generally to restrict the location of commercial establishments to specified commercial zones. 427 U.S. at 62. *American Mini Theatres* also held that the location of adult theatres within such zones could be further restricted so as to disperse such uses throughout a municipality's commercial zones. *Id. American Mini Theatres* does not authorize, and the First Amendment does not permit, the wholesale banning of First Amendment protected expression from all normal and customary avenues of trade in municipalities such as the City of Renton.

In support of their ban on non-obscene expression, Appellants cite various materials that in fact undermine

Appellants' position by underscoring the distinction between dispersal and set-aside statutes. Appellants, for example, rely upon *Zoning Obscenity: Or, the Moral Politics of Porn,* by Norman Marcus, 27 Buffalo L.Rev. 1 (1977).[6] The Marcus study analyzed New York City's attempt to enact an anti-concentration or dispersal adult use ordinance similar to the Detroit ordinance under review in *American Mini Theatres.* The New York City study contrasted the crime rates in districts with concentrated adult uses (*e.g.,* Times Square) and districts with a modest number of such uses. Correlating increased crime rates with the concentration of adult uses, New York City sought to disperse adult uses throughout the customary commercial districts. The Marcus study highlights the deleterious effects of concentrating adult uses and thus runs counter to the Renton set-aside ordinance.

The experiences of other cities, like Detroit and New York, in regard to dispersal statutes, can provide no support to Renton's effort to ban non-obscene, First Amendment protected materials from all normal and customary public access.

It is conceded by the Appellants that no federal Court of Appeals has upheld a set-aside ordinance. The holdings of the First, Fifth, Sixth, Eighth and Ninth Circuits are not erroneous. Unless the First Amendment principals underlying these holdings are affirmed, First Amendment rights will be subject to emasculation by those who would dictate which expression is to be promoted and which expression is to be relegated to atrophy in a "black market".

[6] *See* Brief for Appellants, at 26 and 29.

CONCLUSION

For the reasons set forth above, we respectfully urge this Court to strike the Renton ordinance as an unconstitutional, content-based regulation of First Amendment protected expression, and to affirm the order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MICHAEL A. BAMBERGER
425 Park Avenue
New York, New York 10022
Attorney for Amici Curiae
American Booksellers Association, Inc., Association of American Publishers, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., National Association of College Stores, Inc., and The Freedom to Read Foundation.

DAVID C. BURGER
FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG, MANLEY & CASEY
Of Counsel